Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

KLIMA- UND UMWELTBEDINGTE FLUCHT SYMPOSIUM

Conceivable legal responses to environmental displacement

HÉLÈNE RAGHEBOOM — 20 July, 2015

Natural disasters have always in human history triggered population movements. Mobility is indeed a traditional coping mechanism for populations confronted with changes in their living environment. Scientific evidence and projections of the impacts of climate change on the environment however suggest that the phenomenon will increase in the coming years and decades, affecting primarily developing countries and vulnerable populations.

As mentioned by Walter Kälin, whereas internally-displaced people remain under the jurisdiction of their countries, cross-border displacement triggered by environmental degradation has been identified as a gap in the international legal protection regime. The following will address this normative gap from a European perspective and consider possible legal solutions based on existing legal instruments, focusing on the 1951 Refugee Convention, the European Union Qualification Directive, and the principle of *non-refoulement* under the European Convention on Human Rights (ECHR). The failure of each of the envisaged responses to effectively and comprehensively address environmental displacement seems to call instead for the adoption of a *sui generis* regime.

The limited relevance of asylum law

Refugee status (under both the 1951 Refugee Convention and the EU Qualification Directive) appears to be of limited relevance. Applying the refugee definition requirements to environmental displacement, it follows that for a claim to succeed, the applicant needs to demonstrate that the disaster exposes him to a harm that is so severe that it reaches the level of persecution and, cumulatively, that it exposes him to a greater risk of harm as against the rest of the population because of his belonging to a certain racial, religious, national, political or social group (causal link / nexus requirement).

As to the first requirement: degraded environmental conditions can be of such severity that they threaten individuals' life or person, or expose them to risks of serious violations of other human rights (including economic, social and cultural rights). It is possible to argue that the effects of

environmental degradation or their accumulation can expose individuals to serious threats that could reach the severity threshold of persecution. The main caveat pertains to the second requirement. Persecution and refugeehood could only be established when the State (or non-State actors) deliberately causes the environment to deteriorate in order to harm a particular racial, religious, national, political or social group, or selectively denies protection to individuals belonging to such a group. Although such cases are not purely hypothetical (e.g. the use of herbicides in Vietnam by US forces and deliberate draining and desiccation of Southern Iraq marshlands by Saddam Hussein's regime), they would however represent only but a limited subset of displacement triggered by environmental change.

Besides refugee status, the EU legislator has developed an additional protective status, drawing upon existing forms of complementary protection available within and outside Europe. Subsidiary protection is intended to cover situations where applicants are not entitled to refugee status but in which the principle of *non-refoulement* should nonetheless apply. It appears subsidiary protection could apply in two sets of cases. People forced to leave their home and country due to an environmental disaster may qualify for subsidiary protection, provided they also flee a situation of armed conflict. The possibility is noteworthy insofar as literature has acknowledged a linkage between environmental change and conflicts: environmental change can exacerbate tensions or even trigger conflicts, due to competition over depleting resources for instance, and, conversely, conflicts can deteriorate the environment to such an extent that life in the area becomes unbearable and people are forced to move. Secondly, subsidiary protection could be granted in

situations where, upon return, individuals would face a real risk of suffering torture or inhuman or degrading treatment or punishment, *i.e.* situations in which *non-refoulement* would be granted under Article 3 ECHR (Qualification Directive Article 15(b) corresponds, in essence, to Article 3 ECHR).

Environmental disaster, dire humanitarian conditions and the principle of *non-refoulement*

The European Court of Human Rights (ECtHR) has developed two separate tests to assess *non-refoulement* claims. In case of a "naturally-occurring" phenomenon (such as disease), the ECtHR assesses the applicant's situation against the high threshold of "compelling humanitarian considerations": *non-refoulement* may exceptionally be triggered, in cases where the humanitarian grounds against removal are compelling (D. v. UK, N. v. UK). In other cases, where the situation is at least partly attributable to the State (MSS v. Belgium and Greece; Sufi & Elmi), the Court applies a lower threshold and finds that "dire humanitarian conditions" place individuals at real risk of Article 3 ill-treatment. In such cases, the Court has regard to the applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame.

It can be argued that this test is the appropriate test to consider most claims submitted by environmentally-displaced persons. Disasters and their impacts on populations are hardly ever purely "naturally-occurring": the impact of a disaster is described as a function of the severity of the hazard and vulnerability of the population, and of the

capacity of the population to deal with it. Therefore, dire humanitarian conditions which can exist in the aftermath of a natural hazard disaster or due to the progressive degradation of the environment are always partly attributable to an act or omission of the affected State's authorities, hence the relevance of the test developed by the ECtHR in MSS and elaborated upon in Sufi & Elmi. The same is of course true in cases of environmental disasters triggered by technological accidents. It appears that operating the "dire humanitarian conditions" test could protect from *refoulement* people displaced by environmental disasters (especially sudden-onset disasters), provided the situation in their country of origin exposes them to risks of inhuman or degrading treatment. The Qualification Directive should be interpreted and subsidiary protection granted accordingly. Furthermore, amending the Qualification Directive could be considered, to better reflect the case-law of both the CJEU and ECtHR, and the new reality of environmental change as an increasingly powerful driver for displacement.

Much will depend on the willingness of asylum authorities and courts, including the ECtHR, to ensure that the principle of *non-refoulement* fully serves its original purpose of protecting persons who would face ill-treatment upon return. The observed trend in State practice and the difficulty for the EU to effectively tackle the ongoing 'Mediterranean crisis' do not point toward a broadening of protection grounds.

A call for a *sui generis* regime to comprehensively address environmental displacement

Some solutions are conceivable *de lege lata*. But are they suitable? Given the object and purpose of the protection granted under the existing regime of international protection (*e.g.*: palliative focus, temporary solutions) and the nature of environmental displacement (its multiple root causes, consequences, forms and varying timespan), the question should be answered in the negative.

There is a divide in literature between authors who suggest the adoption of a new convention specifically addressing environmental displacement, and tackling either internal or cross-border displacement or both simultaneously, and those who oppose it. In brief, three tendencies appear: proposed options are based on elements of the existing international protection regime and/or on (labour) migration law or on international environmental law, or draw on a combination of elements of different fields of law. Whereas the majority of instruments proposed are meant to apply at the global level, some authors suggest regional or bilateral solutions instead.

An attempt to formulate a solution based solely on one or another branch of international law makes clear that, when singly considered, the different normative bodies all fail to comprehensively address environmental displacement. At the same time, each normative body proves to be suitable to address certain specific aspects of the issue. The principle of *non-refoulement* is but one element of the international protection regime that can be relevant to address environmentally-displaced persons' claims. As regards the rules of State responsibility for environmental damage and its consequences, they do not account for the specificities of the root causes of environmental damage and of migration, and risk undermining efforts towards a necessary

international cooperation. Nonetheless, principles derived from them such as States' obligation of due diligence can be relevant.

An effective means of comprehensively addressing environmental displacement might therefore lay in the combination of relevant rules, mechanisms and principles borrowed from the different branches of international law, into a *sui generis* regime. Such a framework would consider environmental displacement as one element of a broader picture: environmental degradation including climate change at large. Addressing environmental displacement in isolation from its root causes would indeed be illusory and counterproductive. Responding to displacement itself must therefore form part of a larger response. Necessarily cross-sectoral, this *sui generis* regime would encourage and empower States and other stakeholders to act not only in a palliative manner, once the catastrophe has occurred (or begun) and populations are on the move, but also pre-emptively, to prepare the environment, infrastructures as well as populations both in countries of origin and in destination countries. Additionally, it should allow for longer-term solutions and envisage measures to adopt at a later stage, to address the consequences of the disaster and of the correlate population movement (including return to their once devastated region of origin).

The adoption of a single instrument that would formulate a set of principles and rights relevant for the protection of displaced persons (both before and after displacement takes place) and define their international legal status (such as the Draft Convention on the International Status of Environmentally-Displaced Persons) would ideally form part of such a regime. However, pending the adoption of such an

instrument – if ever States can agree to negotiate such an instrument, a number of practical legal solutions and measures could be developed at the national, bilateral, regional but also, to some extent, global levels to anticipate disasters and migration/displacement (internal and cross-border), protect displaced persons in need of protection, and mitigate the impact of both disaster and displacement, both on countries of origin and of destination. Human mobility – whether internal, regional or international – should be acknowledged as an essential part of such a regime. Contingency plans, relocation and resettlement programs, designed in due consultation with the population concerned, would contribute to disaster risk reduction.

Furthermore, migration can also assist in rebuilding a country affected by a disaster, *i.a.* through alleviating the pressure on natural resources and State infrastructures, and through remittances transfers (the contribution of diaspora to the economy of their country of origin is often non-negligible). This year's migration crises in Europe and South East Asia clearly illustrate that people faced with threats to their lives or persons will inexorably seek entry into other countries, sometimes to the point of risking their lives. Devising a regime capable of organising and managing migration therefore appears as a more realistic approach than obstinate – and hopeless – endeavours to impede migration. Moreover, the adoption and implementation of anticipatory measures in both countries of origin and of destination can curb forced displacement.

States' growing awareness of the reality of climate change and its impacts on human mobility calls for the international community and international law to address these phenomena, their root causes and consequences. In order to

secure States' commitment, any proposed solution must carry with it an insurance of burden-sharing: States should all contribute to addressing the issue of environmental displacement, according to their specific assets, circumstances and capacities. The upcoming UN Conference on climate change (COP21) is of utmost importance in that regard: the international agreement States are expected to reach could help mitigate the detrimental impact of climate change and incidentally, environmental displacement. It will also be an opportunity for the international community to acknowledge the needs of affected populations and address them in a spirit of international cooperation and respect for human rights.

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This contribution is part of the series on climate-induced forced migration, which the FlüchtlingsforschungsBlog and the Völkerrechtsblog issue jointly.

ISSN 2510-2567

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